IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 348

CURTIS D. MacDOUGALL, et al.,

Appellants,

vs.

DWIGHT H. GREEN, Individually and as Governor of the State of Illinois, et al.,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF THE ATTORNEY GENERAL OF ILLINOIS ON BEHALF OF DWIGHT H. GREEN, GOVERNOR, ETC., ET AL.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South La Salle St., Chicago 4, Ill.
Attorney for Certain Appellees.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
Assistant Attorneys General,
Of Counsel.

INDEX.

Index of Cases.

Statutes Cited.

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STATEMENT OF THE CASE.

Appellees On Whose Behalf this Brief is Filed.

This brief is filed upon behalf of the Governor, the Auditor and the Secretary of State of Illinois, whom only the Attorney General of Illinois has authority to represent (*Fergus* v. *Russel*, 270 Ill. 304), and seventeen county clerks, named in the record, whose respective state's

attorneys have requested the Attorney General to appear for them.

Reference to the Decision Below, Which Is Not Reported.

The District Court's decision was embodied in findings of fact, conclusions of law and that court's judgment. No opinion was written. Since this court has ordered the cause to stand upon the typewritten record, which is now on file in Washington and is not accessible to counsel writing this brief, it is not possible for us to cite the page of the record where the findings, conclusions and judgment will be found.

The conclusion and order denying temporary injunction, but not the formal recitals of fact that precede them, are quoted, *post*, p. 6.

The Position of the Attorney General of Illinois in this Case.

For the reasons hereafter briefly stated and developed, the Attorney General of Illinois is of the view that appellants' complaint is well conceived in substantive federal law, that according to the teachings of four of the seven justices in *Colegrove* v. *Green*, 328 U. S. 549, the triumverate District Court had jurisdiction to grant the relief prayed notwithstanding the political character of this litigation, and that the District Court's judgment ought to be reversed with appropriate directions.

Nevertheless, because the issues tendered by this case are of grave import and have never been directly passed upon by this Court, the Attorney General asks this Court to consider this brief, neither as a confession of error nor as primarily an advocate's argument, but rather in the nature of an *amicus curiae* presentation of the reasons that lead the Attorney General to the conviction above stated.

A Concise Statement of the Facts of the Case.

Prior to 1935, the Illinois Election Code authorized the formation of "new political parties" by the party's sponsors' filing with the Secretary of State a declaration of intention to form a new party. Such a declaration was required to name the party, name its candidates at the next general election, give their addresses, comply with other formalities not material in this case, and bear the signatures of at least 25,000 qualified Illinois electors (Cahill's Ill. Rev. Stats. 1933, Ch. 46, par. 205, p. 1279). All of these provisions and requirements are retained in the Act as it presently stands. No question is raised with respect to them.

In 1935, however, the statute was so amended that it incorporated the additional requirement that at least 200 of the electors' signatures should come from residents of at least fifty of Illinois' 102 counties. (Ill. Rev. Stats. 1935, Ch. 46, par. 205, p. 1483).

At least 86 per cent of Illinois' voters live in forty-nine counties. Over half of Illinois' electors live in Cook County alone.

In short, the 1935 amendment, if valid, would make it impossible for 86 per cent of the Illinois electorate to nominate a candidate for any state office, for United States senator, or for congressman-at-large.[1] But only 25,000 voters from any 50 of the 51 least populous counties could

[1] Illinois enacted a new congressional reapportionment act in 1947 after this Court's decision in *Colegrove* v. *Green*, 328 U.S. 549, had focused attention upon the gross inequalities in Illinois' gerrymandered congressional districts. Therefore there will be no congressman at large from Illinois in 1949 and thereafter. But Illinois did have a congressman at large in 1935, when the amendment was passed, and will continue to have one until after the 1948 election.

nominate an entire ticket, providing only that at least 200 signatures were obtained from each of such 50 counties.

Appellant Progressive Party is a nascent political party in Illinois.[2] Its prospective candidates for the November 2, 1948 election for the offices of presidential and vice-presidential electors, United States senator, and Illinois state constitutional offices filed with the Secretary of State a declaration which, upon its face, appeared to comply with all of the requirements of the Illinois statute, including the requirement that at least 200 signatures be obtained from each of 50 counties.

Applicable Illinois statutes provide in substance that the validity and sufficiency of a new party's declaration of intention be passed upon by the Illinois State Officers Electoral Board, a statutory administrative agency composed of state officers who act *ex-officio* as members of the Board. (Ill. Rev. Stats. 1947, Ch. 46, pars. 10-9, 10-10, pp. 1576, 1577.)

The Board held the Progressive Party's declaration insufficient on the sole ground that of the 75,000 signatures that it bore, a considerable number were invalid either because they were spurious or because their signers had voted in the April, 1948, statewide primary. When the signatures thus found invalid were disregarded, there were less than 200 valid signatures from each of 50 counties.

Appellants conceive that the 1935 amendment to the Illinois Election Code enacted an inequality in electoral potential so egregious as to render that amendment violative of the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment. Appellants further contend that, with respect to the office of United States senator, the amendment violates the sense of the Seventeenth Amendment, which appellants read as

[2] The Progressive Party is an entity capable of sustaining the role of party plaintiff in litigation under the law of Illinois. Its members can be represented as a class by its party officers, its candidates and representative members. (Cf. *Progressive Party* v. *Flynn*, 400 Ill. 102.)

requiring substantial equality of suffrage, not only in the general election of United States Senators, but in the nomination of senatorial candidates.

Most (but not all) of the instant appellants sought the Illinois Supreme Court's leave to file in that court an original petition for *mandamus*. That court denied leave to file such petition by memorandum rescript without opinion.[3]

Petitioners then filed the instant suit, which in its procedural aspects follows the example of the proceedings in *Colegrove* v. *Green*, 328 U. S. 549, seeking temporary and permanent injunction, declaratory judgment and other relief from the enforcement, direct or indirect, of the 1935 amendment, which they assailed as unconstitutional.

The declaration filed with the Secretary of State contained the names of certain persons who had voted in Republican or Democratic primaries and who were therefore disqualified, under the Illinois statute, as signatories for a petition seeking the nomination of persons *for the same offices that were voted upon at the Illinois primary election of April 13, 1948*, raising a question of Illinois statutory law (Ill. Rev. Stats. 1947, Ch. 46, par. 10-4, p. 1574) discussed *post*. Appellants contend that the Illinois Election Code did not, under the Illinois law, disqualify such persons as Illinois signatories on the Progressive Party petition *for the offices of presidential and vice-presidential electors* since those offices were not voted upon at the April 13, 1948 primary election.

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[3] It is not possible to determine whether the Illinois Supreme Court intended its unexplained denial of leave to file as an adjudication on the merits (Cf. *Bowen* v. *Hughes*, 370 Ill. 255) or because it probably tendered issues of fact (Cf. *White* v. *Ragen*, 324 U.S. 760, recognizing that the Illinois Supreme Court is not bound to entertain, and will not usually entertain, original proceedings for *mandamus* that tender issues of fact that it had no facilities to try.) *Certiorari* from this Court would therefore have been unavailing. This was directly held in *White* v. *Ragen*, cited above.

But *Colegrove* v. *Green*, 328 U.S. 549, makes it clear that in any event, when political emergency is immediate, it is not necessary to exhaust state remedies if the time before election is so short that it would be impossible for a case to proceed from the state *nisi prius* court to this Court before the election is to be held.

The District Court's Decision.

The District Court's conclusions of law, proceeded by formal recitals that we do not quote, were as follows.

> "1. The provisions of § 2 of Article X (§ 10-2, c. 46, Ill. Rev. Stat. 1947) requiring for a valid nominating petition at least two hundred signatures of qualified voters from each of at least fifty counties is not repugnant to, nor in violation of any provisions of the Constitution of the United States, nor does it contravene § 18 Article II of the Constitution of Illinois.
>
> "2. This Court is without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board of August 31, 1948 and to hold that the board's election is null and void.
>
> "3. The motion for the interlocutory injunction will be denied."

The Questions Presented.

1. Does the patent, gross and undisputed inequality in electoral potential enacted by the challenged 1935 amendment to the Illinois Election Code deny privileges and immunities, due process of law or equal protection under the Fourteenth Amendment?

Comment on this Question.

"Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. * * *" (*Snowden* v. *Hughes*, 321 U. S. 1, at p. 11, citing *McPherson* v. *Blacker*, 146 U. S. 1, 23-4; *Nixon* v. *Herndon*, 273 U. S. 536, 538; *Nixon* v. *Condon*, 286 U. S. 73).

Insofar as state offices only are concerned, the concept of "federal privileges and immunities" may not be applicable. (*Snowden* v. *Hughes*, *supra*). But the right to vote for United States senator, being conferred by the Seventeenth Amendment, would seem

to be a "privilege" federal in character and therefore now deriving protection from the Fourteenth as well as the Seventeenth Amendment. The right to vote, although certainly not "property," would seem to be a "liberty" under "a republican form of government."

A question remains, however, as to whether flagrant inequity in electoral potential is unconstitutional when it is based upon geographical considerations. (Cf. the gross inequalities in the case of representation in the United States Senate and in the matter of a choice of president and vice president.) The Attorney General of Illinois submits, for reasons discussed in the Argument, *post*, that a state may not grossly discriminate between the voting strength of its citizens for offices, state or federal, to which election is by state-wide suffrage without infringing the equal protection clause of the Fourteenth Amendment.

2. Does the 1935 legislation deny to the inhabitants of Illinois a "republican form of government" and therefore violate Section 4 of Article IV of the Constitution?

3. If the Fourteenth Amendment does not vitiate the 1935 Illinois enactment, is that enactment nevertheless unconstitutional with respect to elections to the office of United States senator because the Seventeenth Amendment intends that United States senators shall be chosen as a result of equality of suffrage?

4. If the Seventeenth Amendment vitiates the 1935 amendment with respect to the office of United States senator, does the entire amendment fail because it cannot be assumed that the legislature would have passed it had that assembly realized that the amendment was invalid with respect to the senatorial office?

5. If the federal constitutional questions are decided adversely to appellants, did the District Court have jurisdiction to hold, and should it have held, that, upon a reading of state law, there were sufficient valid signatures with

respect to the office of presidential and vice presidential elector as to entitle the Progressive Party to a place on the ballot as to those offices only?

6. Does this Court have jurisdiction to decide the questions presented by this record?

7. If jurisdiction exists, should it be exerted or should its exercise be forborne?

Possible Solutions of These Questions.

This Court could, without overruling any directly applicable case, without departing from any recognized canon of constitutional doctrine and not without logic, reach any one of the following solutions to these questions:

1. The gross inequality of electoral potential enacted by the 1935 amendment denies equal protection and vitiates that whole amendment. Therefore the District Court should have granted relief by declaratory judgment and, if necessary, by injunction to restrain the holding of an election to which the Progressive Party would be excluded from the ballot.

2. This Court might hold that the Fourteenth Amendment does not nullify the 1935 amendment to the Illinois Election Code but the Seventeenth Amendment frustrates it as to the office of United States senator only. The Court would then have to hold either

A. That the 1935 amendment is valid as to all offices except that of United States senator

or

B. Although the amendment is void only as to the office of United States senator under the Seventeenth Amendment, this emasculation deforms it into an enactment that the legislature would presumably not have passed had it known that it was not validly legislating with respect to the senatorial office. In

this latter case, the whole amendment would fail even though the *reason* for the failure were to be found only in the Seventeenth Amendment.

But should this Court hold that a state may virtually disfranchise 86 per cent of its inhabitants in its 49 most populous counties, so far as forming new political parties is concerned, by making their power of nomination contingent upon cooperation of a very small number of persons in 53 less populous counties, it would, in the opinion of the Attorney General of Illinois, sanction a flagrant denial of federal constitutional rights.

Finally, should the Court approve this gross inequality so far as the Federal Constitution is concerned, it could either accede to or reject appellants' contention that under a proper construction of the Illinois Election Code the Progressive Party's declaration was valid as to the offices of presidential and vice presidential electors because those offices were not the subject for nomination in the primary election in which certain of the Progressive Party's signatories disqualified themselves by voting in Republican or Democratic primaries.

ARGUMENT.

I.

The District Court and this Court have jurisdiction of the controversy presented by this case. No ground exists for forbearing the exercise of that jurisdiction if appellants' rights are well conceived.

In *Colegrove* v. *Green*, 328 U. S. 549, four of the seven justices participating in the decision expressed the view that equity had jurisdiction to act, by injunction, declaratory judgment or otherwise, to prevent a state or its officials from holding an election that would violate substantial federal constitutional rights.[4] The justices so concurring reached their opinions notwithstanding earnest argument to the contrary by the Attorney General of Illinois.

It is true that Mr. Justice Rutledge cast his vote for affirmance in the *Colegrove* case. But he did so upon the ground, present there and absent here, that the exigencies of the *Colegrove* case were such that had the Court granted the relief sought, it would have left Illinois without any apportionment act whatever and would have precipitated

[4] Mr. Justice Black, speaking for himself, Mr. Justice Douglas and Mr. Justice Murphy, said (p. 568): "It is my judgment that the District Court had jurisdiction; that the complaint presented a justiciable case and controversy; and that appellants had standing to sue, since the facts alleged show that they have been injured as individuals." Mr. Justice Rutledge said (p. 564): But for the ruling in *Smiley* v. *Holm*, 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, * * * would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree." Thus, although Mr. Justice Rutledge does imply a measure of dubiety as to the soundness of the *rationale* upon which this Court's jurisdiction of political controversies has been vindicated, he recognized the justiciability of questions of the sort presented in this case.

a political chaos with no corresponding benefit to the social polity of Illinois.

That no comparable reason for abstention from exercise of jurisdiction in the present case exists is simply and quickly shown by the following reflections:

Suppose that Illinois election officials were threatening to print a ballot and omit therefrom the Democratic or Republican ticket. Every exponent of the cause of political liberty in the United States would be aghast if this Court were to recognize its jurisdiction to prevent such an outrage, as four of the seven justices recognized the existence of jurisdiction in the *Colegrove* case, but were to forbear to exercise it upon the considerations, aptly described by Mr. Justice Rutledge in the *Colegrove* case because they existed there, of delicate regard for the organism of state government.

If, as appellants assert and as we believe, the 1935 amendment is unconstitutional, the inequity done to the Progressive Party is as clear, although it may not be as striking to the public mind, as would the disfranchisement under the pretext of unconstitutional state legislation of one of the nation's great political parties so far as the State of Illinois is concerned.

Unless the teachings of a majority of the Court in *Colegrove* v. *Green* are to be repudiated, the issues tendered by this case are justiciable in the District Court and in this Court if the federal questions are substantial. That the questions are substantial would seem to admit of no doubt. Their substance can best be judged by a consideration of the merits of appellants' contentions, which contentions are considered in the remaining Points of this brief.

II.

Does the 1935 Illinois Amendment to the Illinois Election Code violate the Fourteenth Amendment and the "Republican Form of Government" clause of Article IV, Section 4 of the United States Constitution?

"Where discrimination is sufficiently shown," this Court said in *Snowden* v. *Hughes*, 321 U. S. 1 at page 11, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." And nomination as well as final election of state and federal officers is within the purview of constitutional protection insofar as nomination is accomplished under the auspices of state government. *U. S.* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649.

In the present case "discrimination is sufficiently shown;" for it is shown beyond all peradventure. If substantial equality of electoral potential is required by the concept of "equal protection" or of "a republican form of government," both of which are guaranteed by the Constitution of the United States, the 1935 amendment is arrantly unconstitutional; for it certainly denies such equality.

The only question remaining, then, is:

Is substantial equality of suffrage a general principle of the constitutional philosophy of the United States?

The "rotten boroughs" of England were an outrageous grievance against which all political libertarians, British and American, were vehemently protesting at the time of the birth of the United States and of the writing of the Constitution. Parity of suffrage was the thesis of the political egalitarianism of France, from which philosophy

much of the political and governmental doctrine of the Constitution was derived, English tradition expressing itself in the "civil rights" provisions of the constitution and its first ten amendments. Equality of franchise was the theme around which the post Civil War amendments were written. The term "gerrymander" is an old one in the political lexicon and means a flagrant injustice accomplished by giving some citizens far more voting power than is given to others.

Against these considerations may be urged the observation that there is not even approximate equality of representation in the United States Senate or in the electoral college. But this inequality of representation, although specifically authorized by the Constitution of the United States, ensues from the fact that the United States is a federation of forty-eight separate sovereignties. Equality of sovereignty requires that one house of Congress contain an equal number of "ambassadors from sovereign states," which are *quasi* nations, even though equaltiy of sovereignty frustrates equality of suffrage in the Senate.

But inequality of senatorial representation as among the inhabitants of the several states is balanced by or compensated for by representation in the House of Representatives, where representation is reformed every ten years in order to insure approximation toward equality of suffrage. Flagrant inequality in the matter of voting is certainly contrary to any concept of "republican form of government" as an American norm of political organization.

We think that the 1935 amendment violates the terms of the "republican form of government" guaranty expressed in section 4 of Article IV of the Constitution. But even if the "republican form of government" guaranty may

not be specifically invoked by appellants, certainly that guaranty may be consulted as a canon which informs and gives meaning to the concept of "equal protection" assured by the Fourteenth Amendment.

It would serve no useful purpose to extend further this demonstration of the stark fact that the 1935 amendment denies political equality and therefore denies "equal protection" to the citizens of Illinois under a "republican form of government."

Does the 1935 amendment deny federal "privileges" and "immunities"? Since the right to vote for a United States senator is guaranteed by the Seventeenth amendment, that right is clearly a "federal privilege." The effect of the Seventeenth Amendment is briefly considered under Point III, *post*. We advert to it here only because that right, being a federal privilege, is protected by the "privileges and immunities" clauses of the Fourteenth Amendment.

These considerations seem to us so clear as to render academic the question whether the due process clause is violated. However, we cannot forbear expression of our view that the right to vote is a "liberty" which is denied by legislation as arbitrary as that in the Act assailed in this case.

III.

Does the 1935 amendment to the Election Code violate the Seventeenth Amendment to the Constitution of the United States?

The Seventeenth Amendment provides:

> "The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; * * *" (Emphasis supplied.)

The phrase "*elected by the people thereof*" would seem to import a categorical command that at least substantial, if not, indeed, approximate, equality of suffrage is requisite, not only in the matter of the general election of senators from among candidates previously nominated, but in the process of nomination itself.

The Seventeenth Amendment does not appear to contemplate the choice of senators under state auspices such that there is gross inequality in the voting power of the "people" by whom the United States senators are to be "elected."

If the 1935 amendment is unconstitutional as to United States senators, it would seem that it is invalid in its entirety. Certainly the legislature would not have passed the 1935 amendment at all in anything like its present form if it had supposed that the amendment would be effective as to all offices except that of United States senator.

"No provision however unobjectionable in itself can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall." *Lynch* v. *United States*, 292 U. S. 571. "In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court." *Dorchy* v. *Kansas*, 264 U. S. 286.

IV.

The Question of State Statutory Law.

Where substantial federal questions exist, this Court's jurisdiction is properly invoked; and though those questions be decided adversely to the litigants who gain access to the federal courts because they presented substantial federal questions upon which they did not prevail, the Court may retain jurisdiction to dispose of the case upon questions of state law. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Hurn* v. *Oursler*, 289 U. S. 238; *Hillsborough* v. *Cromwell*, 326 U. S. 620.

Paragraph 10-4 of Article 10 of the Illinois Election Code (Ill. Rev. Stats. 1947, Ch. 46, par. 10-4, p. 1574), which was relied upon to invalidate the signatures on the Progressive Party's declaration of those persons who had voted in the April, 1948, Republican primary, provides as follows:

> "Provided further, that any person who has already voted at a primary election held to nominate a candidate or candidates for any office or offices, to be voted upon at any certain election, shall not be qualified to sign a petition of nomination *for a candidate or candidates for the same offices*, to be voted upon at the same certain election." (Emphasis supplied.)

Now in Illinois presidential electors are not nominated at a primary election. *Therefore no one could have voted in such a primary for a presidential elector.* It is plain that under the applicable Illinois law, many of the signatures on the Progressive Party's declaration, although they were invalid insofar as the nomination of state officers are concerned, were valid so far as presidential electors are concerned. The Illinois Electoral Board held many signatures totally ineffective because the signatories had voted in either the Republican or Democratic primary in April,

1948. These signatures were in such numbers that, if they be regarded as effective with respect to presidential electors who were not voted upon in that primary, the declaration clearly entitles the Progressive Party presidential and vice-presidential candidates to have their names placed upon the ballot under the Illinois law.

We are aware of this Court's policy of abstention in deciding cases involving questions of state law. (Cf. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496). But that policy of abstention is a counsel of circumspection, not an inhibition of jurisdiction. It assumes adequate means of realizing rights in state courts.

Once the Supreme Court of Illinois denied appellants leave to file an original petition for *mandamus*, it would not have been feasible to litigate the state questions in a state court; for Illinois' trial and appellate court practice are not such that any such litigation could conceivably have been terminated before the election.

V.

If the 1935 Amendment is unconstitutional, appellants are entitled to the relief which they seek.

Various Illinois statutes fix various dates on or before which various public officials must perform various acts in order to validate ballots. Such statutes require, for example, certification by election boards and other official acts. These statutes are not attacked in this case. But if their enforcement *in this case* were to frustrate appellants' rights when those rights have been denied because the Illinois State Officers Electoral Board acted upon the 1935 amendment as though it were constitutional, then constitutional rights would be denied by a pretext and subterfuge.

The District Court or this Court has jurisdiction to take such measures, by injunction, declaratory judgment or otherwise, as will insure that if appellants have any constitutional rights in this case, those rights will not be nullified by the application of statutes which, though intrinsically valid, cannot be constitutionally invoked to inhibit appellants' liberty of suffrage.

Conclusion.

The Attorney General submits this case to this Court upon the considerations suggested and developed above.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South La Salle St., Chicago 4, Ill.
Attorney for Dwight H. Green,
Governor, etc., et al. and
certain other Appellees.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
Assistant Attorneys General,
Of Counsel.